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Social Justice and the Myth of Fairness: A Communal Defense of Affirmative Action

Phillip J. Closius
University of Baltimore School of Law, pclosius@ubalt.edu

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TABLE OF CONTENTS

I. INTRODUCTION

American political and legal thought is currently in turmoil regarding the propriety of various legal theories and governmental actions designed to provide express benefits and advantages to members of groups which historically have been the victims of culturally-sanctioned discriminations—the body of thought and law which are grouped under the label of affirmative action.[1] As affirmative action policies evolved, various legislative bodies have provided benefits to

* Professor of Law, The University of Toledo College of Law. J.D., Columbia University School of Law (1975); B.A., University of Notre Dame (1972).

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1. *See, e.g.*, Paul N. Cox, *The Supreme Court, Title VII and 'Voluntary' Affirmative Action—A Critique*, 21 IND. L. REV. 767 (1988); Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893 (1994); Janine S. Hiller & Stephen P. Farris, *Separating Myth From Reality: An Economic Analysis of Voluntary Affirmative Action Programs*, 23 MEM. ST. U. L. REV. 773 (1993). The ideas discussed within this Article would be applicable to affirmative action issues based on a status other than race, especially gender. However, this Article focuses only on racial issues, and affirmative action as used herein is specifically limited to governmental activity based on race.

members of minority groups based on race.[2] However, the civil rights movement which gave birth to racial integration and affirmative action is based on a doctrinal construct which innately limits the reach of affirmative action and inherently provides the arguments for its abolition.

In the 1950's and 1960's, proponents of civil rights effectively appealed to the image of America as a country committed to the concept of social justice, a society whose laws always reflected a concern for standards of morality and equality.[3] During that period, legal thought almost unquestioningly defined the primary tenet of social justice as fairness to each individual citizen.[4] The demands of morality and equality would therefore be satiated if the government ensured fairness to everyone regardless of color. The merging of social justice with fairness was appropriate for a movement that was seeking to eliminate blatant, on-the-face discrimination sanctioned by law.

Although pernicious in its effects and difficult to destroy, the elimination of expressed historical discrimination required courage and an increased social consciousness more than sophisticated legal theory or

2. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447 (1988)); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965)(codified as amended at 42 U.S.C. §§ 1973 et seq. (1988)); Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631 (1988)); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972); Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 801-809, 82 Stat. 73 (1968); 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1988)). The term legislative bodies, as used herein, is not restricted to governmental legislatures, but encompasses any group or individual establishing substantive rules (*e.g.* hiring practices) for an entity, group or institution, including faculties or hiring committees.

3. Jerome McCristal Culp, Jr., *Toward A Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 49-50 (describing the effort to achieve equal justice through the court system); Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 1013 (1993)("Rejecting racial distinctions seemed the natural avenue to reversing that history of oppression and achieving racial justice, especially during the 'Second Reconstruction' of the 1950s and 1960s; colorblindness appeared to be the exact antithesis of the form of race consciousness that had been the root cause of racial subordination."); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 836.

4. For a well-known conception of fairness as equated with justice, see JOHN RAWLS, A THEORY OF JUSTICE 342-43 (1971). *See also* ALASDAIR C. MACINTYRE, AFTER VIRTUE (1981).

> Liberal writers such as Ronald Dworkin invite us to see the Supreme Court's function as that of involving a set of consistent principles . . . of moral import, in light of which particular laws and . . . decisions are to be evaluated. . . . But . . . one function of the Supreme Court must be to keep the peace between rival social groups adhering to . . . incompatible principles of justice by displaying a fairness which consists in even-handedness in its adjudications.

Id. at 235.

intellectually difficult legal analysis. The modern Constitution's toleration of inequality candidly based on race was essentially resolved within the context of the straightforward moral imperative of right and wrong.[5] Arguments grounded in the assertion of fairness reflected the moral nature of the debate by keeping the jurisprudential analysis simple, but also provided the basis for judicial opinions which had the appearance of an objective legal principle rather than a subjective moral interpretation.[6] However, after the applications of fairness had ultimately carried the day and eliminated blatant discriminations from the face of the law, issues regarding racial equality became more complex. The resolution of controversies such as de facto discrimination and affirmative action mandates a balancing of conflicting, but legitimate, policies and interests which, in turn, requires more sophisticated legal concepts.[7] In this modern equality climate, the simplistic notions of fairness have proven inadequate as a basis for establishing meaningful social justice and satisfying the full dictates of morality and equality.

The prioritization of fairness had its modern origin in the theories of the legal process scholars whose thought dominated legal reasoning in the post-World War II era. These writers perceived fairness as being embodied within the concept of neutral principles.[8] Law would be fair if every dispute was resolved by an expressed reference to an objective belief or conceptualization which would provide a natural guidepost for the resolution of similar cases.[9] These articulated principles would then constitute the body of an easily administered system of precedent. Stare decisis, as so understood, would therefore eliminate the perceived major flaws of the legal theories which had dominated American jurisprudence prior to legal process—the bias and subjectivity of the natural law[10] and the anarchy and moral relativism

5. *See* Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1742 (1989); Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482, 1490 (1985)(claiming that a moral argument is one that is required by justice or fairness).

6. *See* RAWLS, *supra* note 4. *See also* Shelby Steele, *A Negative Vote on Affirmative Action*, N.Y. TIMES MAG., May 13, 1990, at 46 ("In theory, affirmative action certainly has all the moral symmetry that fairness requires.").

7. Rosenfeld, *supra* note 5, at 1743.

8. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). *See also* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 596 (1987)(claiming that "[t]he idea of fairness as consistency forms the bedrock of a great deal of thinking about morality").

9. John C.P. Goldberg, *Community and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings*, 65 N.Y.U. L. REV. 1324, 1350 (1990)(explaining fairness as "exist[ing] when a regime of laws is applied to similar situations over time with reasonable consistency. Such consistency is required if citizens are to regulate their behavior in accordance with the declared law.").

10. Wechsler, *supra* note 8, at 9-10.

of legal positivism and legal realism.[11] Fairness was both administratively efficient and morally correct in the minds of legal process writers.

The beliefs of the legal process scholars blended perfectly with the social realities of the post-World War II era. Many influential jurists or legal philosophers were immigrants or the children of immigrants who had fled poverty and/or oppressive legal systems.[12] As such, their beliefs were influenced by their perspective as both victims of judicial tyranny and outsiders regarding mainstream American society. From such a viewpoint, they tended to be wary of equity and/or judicial discretion and were attracted to a doctrine which promised fairness and an objective interpretation of the law.[13] At the same time, racial minorities and allied legal theorists became increasingly vocal in their desire to eliminate legally sanctioned discrimination. These civil rights advocates also did not perceive themselves as being part of the societal mainstream in America.[14] They shared with the immigrants a distrust of judicial discretion and concepts of judge-imposed equity which aroused either the suspicion or reality that a judge is likely to favor his own group or to be biased in favor of established societal norms.[15] Therefore, civil rights advocates also gravitated towards a legal construct which mandated an objective process or procedure

11. ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 81-83 (1970). Some scholars believe that legal realism is related to, or a part of, legal positivism; others describe it as a distinct movement often opposed to positivism. *See* Phillip J. Closius, *Rejecting the Fruits of Action: The Regeneration of the Waste Land's Legal System*, 71 NOTRE DAME L. REV. 127, 144-45 (1995).

12. Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863 (1993). For an article discussing the life of an immigrant/scholar, see James R. McCall, *Roger Traynor: Teacher, Jurist, and Friend*, 35 HASTINGS L.J. 741 (1984).

13. Laurence J. Aurbach, *Federalism in the Global Millennium*, 26 URB. LAW. 235 (Spring, 1994)("As immigrant groups came to America, they became Americans with a general sense of toleration, fairness, and civility toward others, while retaining various degrees of national identity.").

14. *See* Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133, 168 (1994)("If the opponents of discrimination and proponents of affirmative action become more confident that their values are shared by most Americans, perhaps they will become more pragmatic and critical about the means of achieving their ends.").

15. This distrust was reinforced by the massive resistance to the integration imperative derived from Brown v. Board of Education, 347 U.S. 483 (1954), by judges in Southern state courts, Southern school boards and other governmental entities in Southern states. *See generally* J. W. PELTASON, 58 LONELY MEN (1971). This suspicion has been increased by the Supreme Court's affirmative action decisions. *See* Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L.J. 79, 146 (1994)(describing how the Supreme Court Justices are influenced by their own values in affirmative action decisions and their views are not always consistent within the Court or with a majority of the public).

which would apply equally to any party involved in a dispute or seeking a benefit. These notions were strongly re-enforced by the observation that legal systems dominated by theories of natural law, legal positivism or legal realism had at least allowed, if not sanctioned, blatant discriminations to exist.[16] Finally, the emergence of the federal government and the growth of the economy dictated that the country in general, and the law in particular, become more national and less local in its scope.[17] Businessmen desired a certainty in the law that would produce a national body of rules and procedures ensuring a known, consistent treatment rather than varied and unknown local customs and discretion. Therefore, immigration, the civil rights movement and nationalization all combined to produce an atmosphere of distrust of judicial discretion which was perceived as disfavoring "outsiders" and permitting subjective bias to rule.[18] All of these movements believed that more certainty and rigidity and less discretion and flexibility would further their interests and advance the cause of fairness.

These legal theories and social realities found a natural means of expression in two Constitutional clauses that theretofore had been of little utility and application—equal protection[19] and procedural due process.[20] The core assumption of equal protection is that similarly situated individuals would receive similar treatment from the law and/or government.[21] Equal protection also supported and was supported by a vision of fairness which mandated that cases or fact patterns which appeared similar be given like results. In a parallel development, a national standard of procedural due process insured a consistent, objective treatment for all citizens in all parts of the country. An emphasis on process would guarantee a systemic understanding that procedures must satisfy a national minimum of fairness.[22] Since equal protection and procedural due process had not received extensive use and/or consideration in American law prior to World

16. *See generally* Reginald Leamon Robinson, *The Impact of Hobbes's Empirical Natural Law on Title VII's Effectiveness: A Hegelian Critique*, 25 CONN. L. REV. 607 (1993).

17. See, for example, the Commerce Clause cases, especially Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); Carter v. Carter Coal Co., 298 U.S. 238 (1936); and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

18. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, 261-64 (4th ed. 1992); HERBERT WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 13-20 (1961).

19. U.S. CONST. amend. XIV, § 1.

20. *Id.*

21. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

22. RAWLS, *supra* note 4, at 3 (explaining that fairness is a procedural fairness that occurs when the principles governing society have been selected according to the proper procedures).

War II,[23] neither legal tool had been subject to an extensive amount of interpretation or an established body of decided case law. Therefore, aside from overtones of *Plessey v. Ferguson* and its progeny, there was no direct body of precedent that needed to be overruled or ignored.[24] A strict application of stare decisis would thereafter safeguard systemic fairness by assuring that similar fact patterns would receive similar treatment regardless of the personal traits or beliefs of the human beings involved in the lawsuit and the creation and/or interpretation of the law. As such, definitions of fairness increasingly emphasized the importance of an objective procedure consistently applied. The twin doctrines of equal protection and procedural due process were also appealing because they were simple and superficial. In a struggle characterized as good versus evil, constitutional doctrines which seemed to contain clear, straight forward answers—treat everyone similarly, establish a known, national standard for judicial process—were irresistibly attractive.[25]

The application and development of this conception of fairness has distorted a complete realization of social justice. Social justice is produced by a broad application of common values and the maintenance of a feeling of community.[26] In such a setting, being fair is a component value which exists with, and is frequently subservient to, other values such as compassion, empathy and trust.[27] The primacy of fair-

23. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 326 (1978)(Brennan, J., concurring in part and dissenting in part).

24. *Id.*

25. Goldberg, *supra* note 9, 1350 (Cardozo "thought that the doctrine of stare decisis, whatever its shortcomings, achieves three important goals which might be labeled fairness, legitimacy, and justice."). *See also* Michel Rosenfeld, *supra* note 5, at 1742-43; Steven F. Williams, *Court-Gazing*, 91 MICH. L. REV. 1158, 1159 (1993)(reviewing DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT (1992))("Can Savage really think that fairness and consistency naturally conflict? Isn't treating like cases alike a criterion of fairness?").

26. For a good explanation of communitarianism see Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685 (1992)(discussing different meanings of communitarianism and comparing and contrasting them to liberalism). *But cf.* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 414 (1990)(proposing that "liberalism" and "communitarianism" are mutually exclusive theories).

27. Miroslaw Wyrzykowski, *Individualism and Communitarianism in a Contemporary Polish Legal System: Tensions and Accommodations*, 1993 B.Y.U. L. REV. 577 (1993):

> The relationship between individualism and communitarianism illustrates a permanent tension that is characterized by constant attempts to find a reasonable balance. In this balancing process, it is first necessary to find a point of acceptance of legitimate values and interests of individualism and communitarianism. This is a starting point for rationalization and compromise of values and interests.

Id. at 599. *See also* NANCY L. ROSENBLUM, ANOTHER LIBERALISM: ROMANTICISM AND THE RECONSTRUCTION OF LIBERAL THOUGHT 184 (1987)(relating communitarianism with political empathy); Robin West, *Law, Rights, and Other Totemic Illu-*

ness, although well intentioned and productive during its incipient years, has ultimately produced a legal system which is rigid in its concepts, superficial in its analysis of significant problems, such as balancing competing valid interests, and, ultimately, unjust in many of its resolutions.[28] Social justice, which, in its long term sense, must include affirmative action, will produce laws and fact patterns which, in the short term, will produce decisions which are unfair to specific individuals. However, the subordination of fairness is permissible, even constitutionally mandated, within a context of communally defined values.[29]

As issues of equality have become more complex, the concept of fairness that fueled equal protection and procedural due process has an insufficient base in substantive values to provide for long term solutions to difficult problems. Fairness principles have become divorced from the human interests that inspired their creation and have instead become the philosophical foundation for a legal structure which glorifies certainty in conceptualization and predictability in application. As such, fairness appeals to the perspective of economic efficiency and materialism which dominate modern American society and its legal system.[30] However, in order to maintain validity and vitality, the law must reaffirm its commitment to communal values rather than the interests of commercialism, administration and individualism.[31] Social justice in such a setting demands that certainty be subordinated to the encouragement of judicial discretion in the weighing of valid interests in conflict. In order to implement shared communal values, America must relearn how to trust its lawmakers, judges and citizens instead of simply demanding that they be predictable.[32]

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sions: Legal Liberalism and Freud's Theory of the Rule of Law, 134 U. PA. L. REV. 817, 859 (1986)(connecting the endorsement of empathy with feminist and communitarian scholars).

28. Karen B. Jewell, Book Note, 83 MICH. L. REV. 1150, 1153 (1985)(reviewing LOIS G. FORER, MONEY AND JUSTICE: WHO OWNS THE COURTS? (1984))(criticizing Forer's notion of due process as essentially a principle of fairness since it is unlikely that courts can ensure fairness "which reflects no differences in resources, education, and power, when the rest of society is in large part built upon such differences"). *See also* VIRGINIA L. WOOD, DUE PROCESS OF LAW 1932-1949: THE SUPREME COURT'S USE OF A CONSTITUTIONAL TOOL 401 (1951)(criticizing the Supreme Court's arbitrary use of due process and concepts of fairness and the lack of a useable standard to determine when such notions should be invoked).
29. Jamie G. Heller, *Legal Counseling in the Administrative State: How to Let the Client Decide*, 103 YALE L.J. 2503, 2512 (1994) (explaining that according to communitarian principles "individual preferences and claims of right must at times be subordinated to the public good").
30. *See*, POSNER, *supra* note 18, at 12-16; Closius, *supra* note 11, at 140-42.
31. CORNEL WEST, RACE MATTERS 56-57 (1993).
32. Lawrence E. Mitchell, *Fairness and Trust in Corporate Law*, 43 DUKE L.J. 425 (1993)(noting that the use of fairness principles has the unfortunate effect of replacing trust).

The current legal system distorts fairness by exhalting it to a position of primacy and by ignoring other values of equal or greater importance. These values are defined by the moral and philosophical traditions of the community and include empathy, compassion, self-sacrifice and the deferment of immediate gratification. Communal values also include a commitment to be fair, a systemic perspective which is vastly different from a rigid enforcement of the primacy of fairness. Fairness, in its current interpretation, emphasizes the individual and the immediate—a focus on whether a person is being currently deprived of a benefit, usually financial.[33] A commitment to be fair perceives an individual's interest in the context of a community and from a long term perspective.[34] Therefore, a deprivation of a financial opportunity, which may be unfair in a short term understanding, can be consistent with the broader perspective inherent in a system of communal values, including a commitment to be fair. Social justice in this communal sense is dependent on lawmakers and judges who are unshackled from the limitations of short-term fairness and the restrictions of predictability and certainty and who are trusted to apply communal values pursuant to a shared vision of long-term societal best interests. A legal system of this kind can assess valid claims of antagonistic positions in terms of those values rather than simply reacting to individualized harm. Such a community can embrace results which seem unfair in the immediate sense of depriving an individual of a financial benefit.

Kurt Vonnegut, Jr. indicates that the foundations of social justice can be discovered in the Bible and the thought of Karl Marx.[35] These same sources help to delineate the subordinated role that fairness must play within the totality of communal values. A Biblical illustration of this understanding is the New Testament parable of the Prodigal Son:[36]

> And he said, "A certain man had two sons." And the younger of them said to his father, "Father, give me the share of the property that falls to me." And he divided his means between them.
>
> And not many days later, the younger son gathered up all his wealth, and took his journey into a far country; and there he squandered his fortune in loose living. And after he had spent all, there came a grievous famine over that country, and he began himself to suffer want. And he went and joined

33. JOHN H. ELY, DEMOCRACY AND DISTRUST 87 (1980)(associating fairness with the resolution of individual disputes). *See also* Lynda J. Oswald, 70 WASH. L. REV. 91 (1995)(discussing regulatory takings and linking notions of fairness with the infliction of harm on individuals). *See infra* note 55 and accompanying text.

34. Tony A. Freyer, *A Precarious Path: The Bill of Rights After 200 Years*, 47 VAND. L. REV. 757, 794 (1994)("The essays exploring . . . affirmative action suggest the degree to which rights exist within a community." Such claims have "force in part because they appeal to a community's norms of fairness.").

35. KURT VONNEGUT, JR., GOD BLESS YOU, MR. ROSEWATER 104 (1965).

36. *Luke* 15:11-32.

one of the citizens of that country, who sent him to his farm to feed swine. And he longed to fill himself with the pods that the swine were eating, but no one offered to give them to him.

But when he came to himself, he said, "How many hired men in my father's house have bread in abundance, while I am perishing here with hunger! I will get up and go to my father, and will say to him, Father, I have sinned against heaven and before thee. I am no longer worthy to be called thy son; make me as one of thy hired men." And he arose and went to his father.

But while he was yet a long way off, his father saw him and was moved with compassion, and ran and fell upon his neck and kissed him. And the son said to him, "Father, I have sinned against heaven and before thee. I am no longer worthy to be called thy son." But the father said to his servants, "Fetch quickly the best robe and put it on him, and give him a ring for his finger and sandals for his feet; and bring out the fattened calf and kill it, and let us eat and make merry; because this my son was dead, and has come to life again; he was lost, and is found." And they began to make merry.

Now his elder son was in the field; and as he came and drew near to the house, he heard music and dancing. And calling one of the servants he inquired what this meant. And he said to him, "Thy brother has come, and thy father has killed the fattened calf, because he has got him back safe." But he was angered and would not go.

His father, therefore, came out and began to entreat him. But he answered and said to his father, "Behold, these many years I have been serving thee, and have never transgressed one of thy commands; and yet thou hast never given me a kid that I might make merry with my friends. But when this thy son comes, who has devoured his means with harlots, thou has killed for him the fattened calf."

But he said to him, "Son, thou art always with me, and all that is mine is thine; but we were bound to make merry and rejoice, for this thy brother was dead, and has come to life; he was lost, and is found."

Fairness dictates sympathy for the elder son who worked loyally with his father and did not receive a lavish party in his honor. The celebration in favor of the younger son violates modern notions of fairness. However, the father in the parable displays a sense of social justice which relies on many values and is deeper than adherence to a rigid concept of fairness.[37] He exhibits a deep love for both his sons which makes fairness seem petty. He expresses his devotion to his younger son and his joy at his return by celebrating. He will not allow the primacy of fairness to his oldest son to dictate the expression of his love for the younger. However, the father also loves his elder son and this love includes a commitment to be fair to him. This broader commitment is reflected by the father's expression that everything he possesses belongs to the elder son.[38] A value system which includes a commitment to be fair demands a long term perspective and a broader vision of daily events; a system based on the primacy of fairness will focus on short term insights and an accommodation of immediate needs.

37. *Luke* 15:20.

38. *Luke* 15:31.

Another parable which contains a similar insight is the parable of the Laborers in the Vineyard:[39]

> For the kingdom of heaven is like a householder who went out early in the morning to hire laborers for his vineyard. And having agreed with the laborers for a denarius a day, he sent them into his vineyard. And about the third hour, he went out and saw others standing in the market place idle; and he said to them, "Go you also into the vineyard, and I will give you whatever is just." So they went. And again he went out about the sixth, and about the ninth hour, and did as before. But about the eleventh hour he went out and found others standing about, and he said to them, "Why do you stand here all day idle?" They said to him, "Because no man has hired us." He said to them, "Go you also into the vineyard." But when evening had come, the owner of the vineyard said to his steward, "Call the laborers, and pay them their wages, beginning from the last even to the first." Now when they of the eleventh hour came, they received each a denarius. And when the first in their turn came, they thought that they would receive more; but they also received each his denarius. And on receiving it, they began to murmur against the householder, saying, "These last have worked a single hour, and thou hast put them on a level with us, who have borne the burden of the day's heat."
>
> But answering one of them, he said, "Friend, I do thee no injustice; didst thou not agree with me for a denarius? Take what is thine and go; I choose to give to this last even as to thee. Have I not a right to do what I choose? Or art thou envious because I am generous?" Even so the last shall be first, and the first last; for many are called, but few are chosen.

In a reaction similar to that of the parable of the Prodigal Son, adherents of fairness would argue that the householder is unfair because the laborers who worked more hours should be paid more. In such a perspective, the householder undermines individual merit and achievement by paying the same amount of money for less work.[40] However, the parable clearly prioritizes the value of generosity over a rigid application of fairness. The householder still maintains a commitment to be fair as part of his values (as evidenced by his statement "Friend, I do thee no injustice . . ."),[41] but this produces a long term perspective informed by other values, not the short term result demanded by the laborers' sense of fairness. The communal good and the importance of other values supersede the materialism inherent in fairness. The dictates of economic efficiency are subordinated to higher values within the culture.

Karl Marx embodied this distinction in the phrase "From each according to his ability, to each according to his need."[42] Modern Western capitalism and the single-minded devotion to economic efficiency

39. *Matthew* 20:1-16.

40. See the reference to this perception in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 604 (1990)(affirmative action "[M]ay create considerable tension with the Nation's widely shared commitment to evaluating individuals upon their individual merit.").

41. *Matthew* 20:13.

42. Karl Marx, *Critique of the Gotha Program*, *in* THE MARX-ENGELS READER 388 (Robert C. Tucker ed., 1st ed. 1972).

which drive it have rejected this Marxian advice as a viable basis for establishing an economy. In addition to other critiques, capitalism perceives this admonition as a grotesque violation of fairness—individual ability, merit and achievement must be financially rewarded for the system to be economically efficient.[43] However, Marx envisions a society which is committed to a value system much broader in scope than fairness and/or efficiency, one in which the commitment to be fair merges with compassion and empathy to produce an allocation of wealth and resources different from that dictated by a system based on fairness and efficiency.[44]

William Shakespeare makes a similar point in *Hamlet*. Hamlet is discussing with Polonius how an individual should treat and show respect for others (here, the members of a troupe of travelling players):

> Polonius. My lord, I will use them according to their desert.
> Hamlet. God's bodkins, man, much, better! Use every man after his desert, and who should 'scape whipping? Use them after your own honor and dignity. The less they deserve, the more merit is in your bounty. Take them in.[45]

Polonius, the embodiment of efficiency and material success, believes that he is being morally correct by treating people with fairness. Fairness, as he interprets it, dictates that everyone be treated as they deserve.[46] Hamlet rejects this rigid application of fairness by noting

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43. *See, e.g.*, DWIGHT R. LEE & RICHARD B. MCKENZIE, FAILURE AND PROGRESS: THE BRIGHT SIDE OF THE DISMAL SCIENCE 65, 69 (1993)(explaining why the authors "believe it is a mistake for economists to dismiss fairness as not being a legitimate economic concern").

44. *See* Michael Ignatieff, *Falling Apart and Coming Together: Russia and Europe in the 1990s*, 93 QUEENS Q. 804, 808 (1991)(discussing Marxist ideology and its promise of social justice and fair outcomes); Michael K. Ross, Book Note, 90 MICH. L. REV. 1356 (1992)(reviewing BRON R. TAYLOR, AFFIRMATIVE ACTION AT WORK: LAW, POLITICS AND ETHICS (1991)(connecting Marxist theory with distributive fairness). For commentary on the problems with instrumental Marxism from the CLS' point of view and the resulting need for law to appear fair and equal, see Robert W. Gordon, *New Developments in Legal Theory, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281, 288 (David Kairys ed., 1982).

45. WILLIAM SHAKESPEARE, HAMLET act 2, sc. 2 at 552-558.

46. This perspective of Polonius and its contrast with the insight of Hamlet can also be illustrated in the field of criminal law, specifically the exclusionary rule. In considering whether evidence obtained illegally by the police should be admissible against a criminal defendant, much of the current debate concentrates on whether Warren Court precedent should be overturned or whether "guilty" criminals should be set free in society because of "technicalities." Neither of these analysis deal with the substance of the problem and neither will significantly help in addressing crime or producing fair treatment for criminals. Precedent should be overruled or applied differently when the shared values of society so dictate. Concern for letting the guilty go free is, to paraphrase Hamlet, only concentrating on treating people as they "deserve" to be treated or lusting for revenge. The legal system should treat criminals as the honor and dignity of American society dictates individuals be treated, not as they deserve. Focusing on the type of police force a vibrant community desires will ultimately produce a more just society than concentrating on the treatment criminals deserve.

that a commitment to a broader value system dictates that people who do not deserve it should receive more understanding and generosity. The long term perspective dictates that individuals should be treated as the actor's (or society's) honor and dignity demand.[47] Therefore, rather than trying to treat like individuals similarly or attempting to ascertain an individual's past conduct to discover the treatment he/she deserves, a person or community should try to define its value system and then treat others as those values dictate.[48] In such a system, being fair is a component of a long term value system which empowers justice by truly accounting for broader based societal influences and conditions which are frequently ignored in a system of fairness.

This Article shall examine the characteristics of the current analytical framework by first examining some harmful effects resulting from the prioritization of fairness: excessive generalization,[49] formalism and superficiality,[50] and materialism.[51] The Article will then examine in detail the Supreme Court's resolution of modern affirmative action issues.[52] The Court has generated confusion and discord by applying simplistic concepts to complex problems and by adhering to the primacy of fairness in a context in which all interested parties claim that fairness favors their result. Finally, this Article will critique the Court's inability to provide a consistent doctrinal basis for discussing affirmative action issues and will propose a framework for the resolu-

47. The abortion debate provides some insights into this problem. The non-litigant participants in the controversy—be they pro-life or pro-choice—seem more than willing to base their positions and the ensuing discussion on values and the nature of modern societal values within this context. The Supreme Court opinions, however, seem remarkably devoid of this value based discussion. The legal language seems preoccupied by concepts such as the primacy of precedent, advances in medical technology and fitting in changing realities (in the form of new legislation or medical advances) to the *Roe v. Wade* structure. To paraphrase Hamlet, the Supreme Court has provided little direct guidance on how this society's honor and dignity dictates that the abortion controversy be resolved. See Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

48. *See, e.g.*, Lea Brilmayer, *Liberalism, Community, and State Borders*, 41 DUKE L.J. 1 (1991). Brilmayer explains how communitarians designate values:

> To a communitarian, the key value is community membership. The community is both the chief source of political norms and an important source of personal identity. . . . Communitarians tend to emphasize the importance of community traditions in the establishment of political principles. They reject the possibility of universalist reasoning that would ground principles valid for all times and places. Political norms are contextual because norms arise out of the shared history of a particular community. The personal identities that we come to have, likewise, can only be appreciated in the context of the communities that shape us.

Id. at 9.

49. *See infra* notes 60-71 and accompanying text.

50. *See infra* notes 72-79 and accompanying text.

51. *See infra* notes 80-86 and accompanying text.

52. *See infra* notes 87-176 and accompanying text.

tion of affirmative action issues based on a societal dedication to implement communal values.[53] Although a vibrant community must frequently redefine and reassess its values, the moral and philosophical traditions of American society provide a foundation for the shared understanding of these values.[54] Such commonality is essential for any group that considers itself a community. Such a communal value system will also restore trust—trust in others and trust in government.[55] The primacy of fairness is, in many ways, the product of a society that has lost faith in trust.

II. THE EFFECTS OF PRIORITIZING FAIRNESS

The exhaltation of fairness originated in the well-intentioned desire to treat all individuals equally in the eyes of the law.[56] This emphasis was appropriate for the limited time during which the American legal system accepted the principle that the Constitution would not tolerate blatant racial discriminations by the government. However, as that interim period was successfully concluded, the continued primacy of fairness has de-valued more important communal virtues and aspirations which cannot be subordinated for long periods of time if a community is to remain vibrant and meaningful social justice is to be achieved.[57] The continuing devotion to fairness and its attendant legal doctrines has ironically warped the American legal system to the extent that the achievement of social justice is being impeded by the philosophical construct which defined, in large part, the modern consciousness of social justice. The rule of fairness has produced a system which stifles its own *raison d'etre* by cynically debasing more important values and glorifying formalism, superficiality and materialism.[58]

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53. *See infra* notes 177-96 and accompanying text.

54. Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191, 1207 (1994)(defining communitarianism as encompassing the belief "[T]hat the existence of a community is essential to personal identity and successful social organization, and that a community is constituted by the shared moral values of its members."). The tradition which informs communal values in modern America includes the Bible, Shakespeare, Marx and Vonnegut, as noted herein.

55. *See generally* AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA (1993); Leslie Green, *Law, Legitimacy, and Consent*, 62 S. CAL. L. REV. 795 (1989).

56. *See* Stephen Reinhardt, *Civil Rights and the New Federal Judiciary: The Retreat from Fairness*, 14 HARV. J.L. & PUB. POL'Y 142 (1991).

57. *Id.* at 148-49.

58. Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1646 (1985)(explaining that fairness as a standard is the reason for the "time-consuming and expensive nature of our litigation system").

A. Excessive Generalization

As noted above, fairness has become intimately intertwined with notions of equal protection and neutral principles.[59] This, in turn, has led to a limited use and understanding of precedent and a pre-occupation with consistent results. Fairness, as applied through these legal concepts and devices, dictates that any particular fact pattern be resolved by reference to an extrapolated rule or principle of general application to ensure consistency in the resolution of similar future fact patterns.[60] This constant reference to generalization and consistency can produce bizarre results in any immediate fact pattern.[61] Moreover, consistency—the slavish devotion to a narrow concept of precedent—then becomes the overriding goal of the system at the expense of a legitimate balancing of competing interests informed by long-term communal norms. The emphasis on fairness and consistency allows the concept of social justice to become incredibly distorted as judicial reasoning shifts from determining a resolution which is just in the context of the proper values of contemporary American society to producing a result consistent with an extrapolated, general principle which can be derived from fact patterns perceived to be similar.[62] The latter perspective is naturally appealing to any system because the inquiry demanded is easier to answer, provides more certainty and predictability for judicial decisions, makes judges and attorneys less personally responsible and grants the appearance of justice through the satisfaction of fairness. This appeal is particularly potent in modern society because legal administration and its attendant results can then be packaged under the label of efficiency.[63]

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59. *See supra* notes 8-11 and accompanying text.

60. *See* Schauer, *supra* note 8, at 595-602 (arguing that proper respect for precedents ensures fairness by treating like cases alike).

61. Charles M. Yablon, *Law and Metaphysics*, 96 YALE L.J. 613, 628 (1987)(book review):

> It may be that we value the attitudes of neutrality, rationality, and deference to precedent independently of whether those attitudes achieve the correct result. Or perhaps we are willing to say, unlike Kripke and his bizarre skeptic, that any results achieved through such dispositions are, by that very fact, correct results.

See also Arthur Kuflik, *Majority Rule Procedure, in* DUE PROCESS 296, 316-25 (J. Roland Pennock et al. eds., 1977)(arguing that "fair procedures" do not always have just results).

62. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 113 (1977)("The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike."); DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY, 22-23 (1983). The Supreme Court has recently stated in the affirmative action context that the general propositions which control racial classifications by the government are skepticism, consistency and congruence. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2907, 2111 (1995).

63. *See* POSNER, *supra* note 18, at 261-66.

Ironically, the case which confirmed equal rights under the Constitution for all citizens, regardless of color, *Brown v. Board of Education*,[64] did not rely on the primacy of fairness and its related concepts. The *Brown* opinion clearly did not rely on precedent, consistency or similar results in equivalent fact patterns to dictate its holding.[65] While the Supreme Court did proclaim that segregated schools violated the Equal Protection Clause, the decision is best understood as a moral statement—a conclusion that segregated schools and the feelings of inferiority they engendered were incompatible with the communal values of modern America.[66] This perspective is more graphically illustrated in the related case of *Bolling v. Sharpe*.[67] In dealing with segregated schools maintained by the federal government (Washington D.C. schools), the Court was theoretically constrained from finding a violation of equal protection principles because the Fifth Amendment does not contain a reference to that clause.[68] The Court overcame this anomaly by simply reading the obligations of equal protection into the Amendment's Due Process Clause, proclaiming that a decision which prevented the states from maintaining segregated schools but allowed the federal government to do so was simply "unthinkable".[69] Years of established legal doctrine were rejected in a single opinion because the opposite result, logical and consistent as it may have been, was so divorced from the values of the country as to be "unthinkable". The values-oriented nature of these opinions was verified by the Court's per curiam application of their holdings to diverse fact patterns in the immediately succeeding years.[70] While enforcing the integration mandate, the Court had no interest in hearing arguments attempting to distinguish fact patterns or in establishing a consistent link with former precedent.

64. 347 U.S. 483 (1954).

65. Wechsler, *supra* note 8, at 31-34. For these reasons, legal process scholars have been critical of *Brown* and the civil rights cases. *See* Closius, *supra* note 11, at 153.

66. Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955): "So one speaks in terms of the most familiar and universally accepted standards of right and wrong when one remarks (1) that racial segregation under government auspices inevitably inflicts humiliation, and (2) that official humiliation of innocent law-abiding citizens is psychologically injurious and morally evil." *Id.* at 159.

67. 347 U.S. 497 (1954).

68. U.S. CONST. amend. V.

69. Bolling v. Sharpe, 347 U.S. 497, 500 (1954). The Supreme Court has recently confirmed the implicit demands of equal protection on the federal government and the similar meaning of such requirements under both the Fifth and Fourteenth Amendments. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2907, 2106-08 (1995).

70. Wechsler, *supra* note 8, at 26-27.

B. Formalism and Superficiality

The devotion to fairness has also produced a formalism in the legal system—a focus on the appearance of fairness, an inability to perceive substance over procedure. The prioritization of fairness and its related legal conceptualizations—excessive generalizations, a narrow interpretation of precedent and a literal interpretation of procedure—appeals to the infatuation with efficiency which drives much of modern American thought.[71] Fairness is easier to administer than a true commitment to justice and produces a context for the judicial system which seems to be based on a value. However, this notion of fairness is inherently superficial because its scope is necessarily limited. Treating similarly situated people in a similar manner can never produce full social justice because of the difficulty in truly assessing similar situations. For example, fairness cannot account for deep differences in the background of various individuals subjected to the legal system—the impoverished, parentless background of an accused criminal defendant; the sexist, abused upbringing of a rural woman; the distinctions in education and self-esteem that monied backgrounds will always produce in the privileged. The gains made by the early implementation of fairness and equal protection were critically important to the development of America and the growth of the civil rights movement. However, these gains dealt with the superficial—the elimination of conscious, admitted, on-its-face racial discrimination.[72] These doctrines have now become entrapped within the realm of superficiality they were enlisted to destroy. As discrimination has become more sophisticated, as judgments have become more complex, these tools are inadequate devices for establishing social justice. As valued as they were in their time, a just society for the 21st century needs to move beyond the restrictions and superficiality inherent in the primacy of fairness and establish a judicial system based on communal values.

Simple examples illustrate the limitations inevitable in a doctrinal perspective which exaggerates the importance of fairness. In standardized testing, fairness and related procedural concerns assure that questions are not culturally biased, that everyone has the same time to complete the exam and that the same conditions are generally applied regardless of the traits or beliefs of the individual takers. However, modern fairness is too limited in depth to account for the reality that many wealthy students have been practicing for the tests for years while many poor students are taking the exam for the first

71. *See* POSNER, *supra* note 18, at 12-16.

72. *See* Palmore v. Sidoti, 466 U.S. 429 (1984); Brown v. Board of Educ., 347 U.S. 483 (1954).

time.[73] Hypothetically, fairness can also be used to police the equality of the conditions under which a race will be run. However, the perspective of fairness is too limited to account for the fact that some runners have trained for a year at an Olympic training facility while others have not had any training at all. The race would appear to be run under equal conditions, but the substantive unfairness of unequal training conditions would be ignored by the superficial nature of an analysis which prioritizes fairness. Equalized immediate conditions dictated by fairness do nothing to deal with inherent unfairness concerning deeper societal conditions.[74] Fairness is arguably harmful to the achievement of social justice because it imparts the appearance of equal conditions to a reality that is incredibly unequal. Fairness and its application can be effective in combatting superficial discriminations—*e.g.* black takers being given a different, and more difficult, test than whites. However, as discriminations become more subtle, the inadequacies of fairness become apparent.

As the commitment to fairness developed within the American legal system, fairness became increasingly procedural in nature and found further expression within the notion of procedural due process.[75] The desire to protect minorities and "outsiders" blended with the necessity of nationalizing America to produce a broad legal consensus that process be made objective and equally applicable to all. Fairness would best be served by a rigid interpretation of procedural due process which would guarantee every American equal treatment from the applicable governmental entity regardless of color or local origin.[76] Despite such laudatory goals, procedural due process has contributed to the formalism and superficiality inherent in the primacy of fairness. Procedural rights are expensive and have become a critical component in any defensive strategy involving delay and cost. More importantly, procedural due process shifts the legal focus from underlying substantive concerns to the efficacy of the procedure at is-

73. Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1465, (1994).

> The equality paradigm suggests that it is beyond the scope of public policy to remedy inequality that persists after fair and equal procedures have been established. Thus, procedural fairness has no necessary connection to fair outcomes: lending outcomes are considered beyond question as long as lending criteria are arguably rational and clearly nonracial. In contrast, the affirmative action model maintains that the lingering effects of past discrimination cannot be cured by equal treatment alone, but only by affirmative steps to make equal opportunity a reality.

Id. at 1484.

74. Jewell, *supra* note 28, at 1153.

75. *See* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA, 93-95 (1974); RAWLS, *supra* note 4, at 3.

76. *See* RAWLS, *supra* note 4.

sue.[77] Although procedural due process is a significant value within our constitutional framework, the exhaltation of process will not provide a panacea to the complex issues of equality in a modern society.[78] The primacy of fairness will inexorably lead to a formalism and superficiality which will, among other consequences, ultimately exaggerate the importance of procedure and exhalt process over substance.

C. Materialism

Undue reliance on fairness will also engender an emphasis on materialism. In both parables, fairness is the argument used to demand more money, more material wealth.[79] This association with materialism also explains the appeal of fairness in the post-World War II world in which America was striving to build its economy and the children of immigrants were trying to secure the material advantages of America for their descendants.[80] However, materialism becomes a significant problem once fairness is transposed from its original context of eliminating governmental or societal disabilities premised on the assumption of racial inferiority to a modern legal environment seeking to forestall the denial of a financial benefit or opportunity to majoritarian race individuals. The dictates of fairness should apply more rigidly regarding the imposition of penalties, or the encouragement of disrespect for individuals or groups, on the basis of race.[81]

However, when fairness is applied in the context of the deprivation of a monetary opportunity (*e.g.* getting into the graduate school of your choice or being given a contract), materialism will be encouraged because, especially in modern society, individuals will always seek more benefits.[82] The primacy of fairness does not ask the value-inspired question of whether you have enough—it simply justifies a demand for more.[83] If a member of a majoritarian racial group fails to obtain a financial benefit, the denial does not stigmatize the individual in-

77. *See* RAWLS, *supra* note 4, at 3. *See also* Mitchell, *supra* note 32, at 425.

78. McGeorge Bundy, *A Lay View of Due Process*, *in* GOVERNMENT UNDER LAW 363, 378 (Arthur E. Sutherland ed., 1968)(People take due process, which is grounded in fairness, "for a ride." "Nothing is more natural, and nothing is more dangerous to the law as a whole."). *See also* Thomas C. Grey, *Procedural Fairness and Substantive Rights*, *in* DUE PROCESS 182, 182-202 (J. Roland Pennock et al. eds., 1977)(criticizing the application of procedural fairness in cases regarding substantive rights created by the decisionmaking institution's own rules and arguing that only substantive rights with their source outside of a decisionmaking institution should trigger procedural fairness); Kuflik, *supra* note 62.

79. *See supra* notes 36, 39 and accompanying text.

80. *See generally* POSNER, *supra* note 18.

81. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 318 (1986)(Stevens, J., dissenting).

82. WEST, *supra* note 31, at 25-27.

83. *See* WEST, *supra* note 31, at 44-45.

volved.[84] He may perceive himself as being unfairly deprived of money, but he is not branded with a governmentally encouraged badge of inferiority.[85] As such, a perspective grounded in the prioritization of fairness will shift the focus from the long term interests of the community to the short term benefits of the individual. In such a context, materialism, which by nature is individualistic, will be encouraged to the detriment of social justice and communal values.

III. THE SUPREME COURT AND AFFIRMATIVE ACTION

The Supreme Court has wrestled with the complex balancing of competing interests inherent in affirmative actions cases for nearly 20 years.[86] The fractured splits of the Justices and the divergence and multiplicity of opinions in literally all of these decisions testify to the Court's difficulty in resolving these cases in a manner reflecting some judicial, never mind public, consensus.

In 1978, the Court began its treatment of affirmative action in *Regents of the University of California v. Bakke*.[87] Allan Bakke had been denied admission to medical school at the University of California at Davis while a number of black applicants, with undergraduate grade point averages and MCAT scores lower than Bakke's, had been admitted pursuant to the school's affirmative action admissions policies.[88] Bakke's suit alleged, among other claims, that his rejection was based on race and therefore violated the Equal Protection Clause of the Fourteenth Amendment.[89] Justice Powell's swing opinion decided the case for a sharply divided Court.[90] Powell eventually resolved the case in Bakke's favor by invalidating Davis' admissions practices as a

84. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 356-59 (1978)(Brennan, J., concurring in part and dissenting in part).

85. See *id.* at 387-389 (Marshall, J., concurring in part and dissenting in part).

86. The modern treatment of affirmative action cases by the Supreme Court began with the Bakke decision in 1978. *See* A Symposium: Regents of the University of California v. Bakke, 67 CAL. L. REV. 1 (1979); Kenneth L. Karst & Harold W. Horowitz, *The* Bakke *Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7 (1979). This Article does not analyze all of the Supreme Court's affirmative action decisions but focuses instead on those the author believes to have the broadest application for establishing the constitutionality of affirmative action programs. *See also* Shaw v. Reno, 113 S. Ct. 2816 (1993); United States v. Paradise, 480 U.S. 149 (1987); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986); United Steelworkers v. Weber, 443 U.S. 193 (1979).

87. 438 U.S. 265 (1978).

88. *Id.* at 272-73, 277.

89. *Id.* at 277-78.

90. *Id.* at 272. Justices Brennan, White, Marshall and Blackmun concurred in the judgment but wrote separately to express their deep philosophical disagreement with Justice Powell. Justices Stevens, Burger, Stewart and Rehnquist concurred in part and dissented in part.

constitutionally impermissible racial quota.[91] He also held that any racially-based benefit or disadvantage would be subject to the strict scrutiny test, even if the statute or provision at issue disadvantaged members of the majoritarian race.[92] However, Powell did conclude that race could be taken into account by an institution valuing diversity among its students if race was merely a factor considered within the total mix of an applicant's credentials.[93]

Powell's opinion at heart resolved the issues of affirmative action in a manner consistent with the philosophical construct of the legal process scholars. In denying a governmental actor the ability to remedy the effects of societal discrimination by introducing policies favoring the historically disadvantaged group, Powell relied upon the unfairness of such a remedy because of the "inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making."[94] In addition, Powell noted the personal nature of constitutional rights and interpreted that perspective to mean that the individual had a primacy above any particular group of which he might be a member.[95] Finally, Powell stated that such a resolution was essential for a consistent application of constitutional principle which would establish precedent that could be applied in future fact patterns of a similar nature.[96]

Justice Brennan's opinion concluded that Davis' admissions policies did not violate the Equal Protection Clause by holding that an intermediate standard of review rather than that of strict scrutiny should apply where benefits or disadvantages were imposed upon members of the majoritarian race, a group not subjected to historical discrimination.[97] The judicial standards for such a test mandated that the practice at issue "must serve important governmental objectives and must be substantially related to achievement of those objectives."[98] Brennan also noted the validity of a fairness principle that an imposed burden should bear a relationship to individual responsibility.[99] However, Brennan concluded that restrictions which stigmatized an individual on the basis of race were really at the heart of Fourteenth Amendment prohibitions. In the instant case, neither the black students who were admitted nor Bakke were subject to societal stigma.[100] Brennan therefore concluded that, in the absence of such

91. *Id.* at 319-20.
92. *Id.* at 290.
93. *Id.* at 316-19.
94. *Id.* at 298.
95. *Id.* at 289.
96. *Id.* at 299.
97. *Id.* at 361-62 (Brennan, J., concurring in part and dissenting in part).
98. *Id.* at 359 (Brennan, J., concurring in part and dissenting in part).
99. *Id.* at 360-61 (Brennan, J., concurring in part and dissenting in part).
100. *Id.* at 373-76 (Brennan, J., concurring in part and dissenting in part).

stigmatization, the burden imposed by the policy was not undue and, therefore, an attempt to remedy past societal discrimination would satisfy intermediate scrutiny.[101] Brennan tried to appease the dictates of fairness by noting that, if there had been no history of societal discrimination, blacks would be doing better in school and on standardized tests and, since Bakke's statistics would be the same, his scores would be relatively lower and he still would not have been admitted.[102]

In *Fullilove v. Klutznick*, a sharply divided Court again considered issues of affirmative action.[103] The federal statute at issue provided for a mandatory 10% set-aside in favor of defined minority business enterprises for federally funded public works projects.[104] The Burger opinion validated the legislation by characterizing it as a strictly remedial law designed to ameliorate proven prior discrimination in the awarding of public works construction projects.[105] Burger further noted that Congress was entitled to greater deference in matters of affirmative action than the states or private entities.[106] Powell, although he joined the Burger opinion, wrote separately to note that a race-based remedy would survive strict scrutiny only when the body imposing such a remedy had authority to act and had made findings of past illegal discrimination.[107] He also concluded that the burden on innocents in this case was not great and was "consistent with fundamental fairness" because the "marginal unfairness" in the statute was not sufficiently significant to outweigh the government's remedial interest.[108] Justice Marshall's opinion concluded that, pursuant to the intermediate standard of review, the minority set-aside was plainly constitutional and "the question is not even a close one."[109] Justice Stewart's opinion invalidated the legislation as arbitrary and unfair.[110] He interpreted equal protection to mean that the individual

101. *Id.* at 376-79 (Brennan, J., concurring in part and dissenting in part).
102. *Id.* at 365-66 (Brennan, J., concurring in part and dissenting in part).
103. Fullilove v. Klutznick, 448 U.S. 448 (1980). The Syllabus of the opinion indicates the disparity of opinion on the Court:

> BURGER, C.J., announced the judgment of the Court and delivered an opinion, in which WHITE and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, *post* p. 495. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 517. STEWART, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 522. STEVENS, J., filed a dissenting opinion, *post*, p. 532.

Id. at 452.
104. *Id.* at 453-55.
105. *Id.* at 477-78, 481-84.
106. *Id.* at 472, 480-81.
107. *Id.* at 498 (Powell, J., concurring).
108. *Id.* at 515 (Powell, J., concurring).
109. *Id.* at 519 (Marshall, J., concurring).
110. *Id.* at 526 (Stewart, J., dissenting).

should always be protected from injury or disadvantage based on race.[111] The color-blindness of the Fourteenth Amendment therefore applied with equal force when the injured persons were not members of a racial minority.[112]

Wygant v. Jackson Board of Education[113] provided the Court with the opportunity to review an affirmative action provision embodied in a collective bargaining agreement. The Jackson school board and the teachers union, in order to safeguard their recent affirmative action hiring program, agreed that, if teacher layoffs were demanded by economic necessity, seniority rules would be subordinated and recently hired minority teachers would not be laid off.[114] Justice Powell's opinion declared the contractual provision to be violative of the Equal Protection Clause. He stated again that ameliorating the effects of societal discrimination and providing role models for minority students suffered from an "indefiniteness" which could not justify the unfairness of harming innocents.[115] He perceived the burden imposed by the layoffs as disruptive and much more intrusive on private lives than hiring goals.[116] Justice O'Connor wrote separately in an effort to find some common ground in the Court's disparate affirmative action opinions.[117] She noted the dispute on the Court regarding the applicability of the standards of strict scrutiny or intermediate review.[118] She also stated that race conscious remedies could be imposed without direct findings of past discrimination or admitted discriminatory practices if the body imposing the remedy had a "firm basis for believing that remedial action is required."[119] O'Connor concluded that the non-remedial purposes of ameliorating societal discrimination or providing role models could not justify the unfairness of the burden which the layoffs placed on innocents.[120]

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111. *Id.* at 523 (Stewart, J., dissenting).
112. *Id.* at 524 (Stewart, J., dissenting).
113. 476 U.S. 267 (1986). The Syllabus indicates that the Justices split as follows:
> POWELL, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C.J., and REHNQUIST, J., joined, and in all but Part IV of which O'CONNOR, J., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 284. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 294. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 295. STEVENS, J., filed a dissenting opinion, *post*, p. 313.

Id. at 268.
114. *Id.* at 270-72.
115. *Id.* at 276.
116. *Id.* at 281-84.
117. *Id.* at 287 (O'Connor, J., concurring in part).
118. *Id.* at 285 (O'Connor, J., concurring in part).
119. *Id.* at 286 (O'Connor, J., concurring in part).
120. *Id.* at 288-89 (O'Connor, J., concurring in part).

Justice Marshall's dissenting opinion in *Wygant* reiterated the propriety of the intermediate standard of review and its satisfaction by the two interests asserted.[121] Marshall further noted that the provision was needed to maintain the integrity of the hiring goals, which were concededly constitutional and laudatory.[122] Justice Stevens' dissent, however, disagreed with the majority on a different basis. He stated that the Court should not inquire if minority teachers possessed a special job entitlement as some form of remedy, but rather should ask if the Board's action advanced the public interest in educating children regardless of any past discriminations.[123] He also perceived a significant constitutional difference between actions which *exclude* members of a minority race and policies which *include* members of a minority race.[124] Inclusive practices, such as the case at bar, are consistent with the core principles of equality at the heart of the Fourteenth Amendment.[125] However, Stevens further noted that any race conscious provisions must be adopted and implemented pursuant to procedures that satisfy the dictates of fairness.[126] Neither side in *Wygant* had disputed that the collective bargaining procedure was unquestionably fair. Finally, Stevens concluded that the harm caused Wygant by the layoffs, while significant, was not based on a lack of respect for her race.[127] The harm was mainly caused by economic hardship and could also occur if the Board needed to disrupt seniority to preserve teachers in a specialty subject in short supply.[128]

A Southern city's affirmative action plan in the awarding of its public construction contracts dramatically split the Court in *Richmond v. J.A. Croson Co.*[129] The Richmond City Council required prime contractors on city projects to subcontract at least 30% of the bid amount to defined minority business enterprises (MBE).[130] An MBE could be from anywhere in the country and included a number of racial minorities in addition to African-American.[131] Justice O'Connor invalidated the plan pursuant to a strict scrutiny standard of review.[132] She noted that race-conscious action stigmatized unless it was clearly remedial in nature. The Richmond Council had been too general in its findings of past discrimination and its plan was too

121. *Id.* at 312 (Marshall, J., dissenting).
122. *Id.* at 306 (Marshall, J., dissenting).
123. *Id.* at 313 (Stevens, J., dissenting).
124. *Id.* at 316-17 (Stevens, J., dissenting).
125. *Id.* at 316 (Stevens, J., dissenting).
126. *Id.* at 317-18 (Stevens, J., dissenting).
127. *Id.* at 318 (Stevens, J., dissenting).
128. *Id.* at 318-19 (Stevens, J., dissenting).
129. 488 U.S. 469 (1989).
130. *Id.* at 477-80. The Plan was similar to the federal set-aside legislation at issue in Fullilove v. Klutznick, 488 U.S. 448 (1980).
131. Richmond v. J.A. Croson Co., 488 U.S. 469, 478 (1989).
132. *Id.* at 505-06.

broad in its scope to be characterized as remedial.[133] In addition, since the Council had a majority of black members, the Plan was not representative of a majoritarian group imposing disabilities upon itself.[134] A minority group imposing benefits for itself heightened the burden on innocents and further violated fairness principles.[135] Justice Scalia wrote separately to reaffirm his belief that race based measures could only survive strict scrutiny if they were strictly remedial, such as a court remedying proven illegal discrimination or a state eliminating its own system based on illegal racial classifications.[136]

Justice Stevens, although concurring, disagreed with O'Connor by stating that race conscious action was not simply limited to a remedial context.[137] However, unlike *Wygant*, the city here did not claim that its function (*i.e.* efficiency in construction contract awards) would be enhanced or improved even if past discriminations were disregarded.[138] Stevens also noted that the Plan seemed more appropriate to judicial rather than legislative action.[139] Finally, Stevens condemned the Plan because the groups being advantaged were arguably from outside the Richmond area and of a racial minority that had never been in Richmond, negating the possibility of being discriminated against there.[140] The Marshall and Blackmun dissents essentially repeated their belief that remedying generalized past discrimination or ameliorating societal discrimination justified the Plan under the intermediate standard of review.[141]

After a decade of dissent, Justice Brennan authored a majority opinion in *Metro Broadcasting, Inc. v. FCC*.[142] Congress had provided by statute that (1) minority ownership should be a plus factor in the awarding of new radio licenses by the F.C.C. and (2) certain "distress sales" of existing radio licenses should go exclusively to defined minority ownership groups.[143] The Brennan opinion cited *Fullilove* for the proposition that Congress was entitled to special deference as the national legislature in matters of affirmative action.[144] Within that context, the two policies satisfied the intermediate standard of review.[145] In addition, the burden on nonminorities was not undue and could be

133. *Id.* at 498-504.
134. *Id.* at 495-96.
135. *Id.*
136. *Id.* at 524 (Scalia, J., concurring).
137. *Id.* at 511 (Stevens, J., concurring).
138. *Id.* at 512-13 (Stevens, J., concurring).
139. *Id.* at 513-14 (Stevens, J., concurring).
140. *Id.* at 514-16 (Stevens, J., concurring).
141. *Id.* at 535-39 (Marshall, J., dissenting).
142. 497 U.S. 547 (1990).
143. *Id.* at 552-57.
144. *Id.* at 563.
145. *Id.* at 563-67.

characterized as more of a disappointment than a harm.[146] Justice O'Connor's dissent reiterated the disagreement on the Court regarding the appropriate standard of review in affirmative action cases.[147] She argued that the policies were invalid under the strict scrutiny standard and reaffirmed her belief that such a standard could only be satisfied by legislation which remedied the effects of identified racial discrimination.[148] She concluded by observing the difficulty in determining when race conscious efforts were truly benign.[149] Aside from remedial action, O'Connor believed that the Fourteenth Amendment must be color-blind to protect individuals from benign activity by well intentioned individuals which are based on stereotypes and are ultimately perceived as pernicious.[150] Strict adherence to color-blindness in non-remedial settings will support "the Nation's widely shared commitment to evaluating individuals upon their individual merit."[151]

The Court recently reversed its position on Congressional affirmative action legislation as Justice O'Connor authored an opinion for a sharply divided Court in *Adarand Constructors, Inc. v. Pena*.[152] The case was a challenge by Adarand to a series of statutes and regulations which authorized the United States Department of Transportation (USDOT) to pay money to contractors who employed

146. *Id.* at 596-600.

147. *Id.* at 602-04 (O'Connor, J., dissenting).

148. *Id.* at 608 (O'Connor, J., dissenting).

149. *Id.* at 608-10 (O'Connor, J., dissenting).

150. *Id.* at 610 (O'Connor, J., dissenting).

151. *Id.* at 604 (O'Connor, J., dissenting). In a more recent case, Shaw v. Reno, 113 S. Ct. 2816 (1993), Justice O'Connor spoke for a five person majority declaring a North Carolina redistricting plan to be in violation of the Equal Protection Clause. O'Connor held that the racial motivation for the construction of an odd-shaped, black majority district was insufficiently related to a remedial purpose to satisfy the strict scrutiny standard of review. *Id.* at 2832. Justices White, Blackmun, Stevens, and Souter dissented by concluding that, pursuant to prior voting cases, the white majority plaintiffs had not alleged a cognizable injury. *Id.* at 2834 (White, J., dissenting).

152. 115 S. Ct. 2097 (1995). The Syllabus again indicated the lack of consensus among the Justices:

> O'CONNOR, J., announced the judgment of the Court and delivered an opinion with respect to Parts I, II, III-A, III-B, III-D, and IV, which was for the Court except insofar as it might be inconsistent with the views expressed in the concurrence of SCALIA, J., and an opinion with respect to Part III-C. Parts I, II, III-A, III-B, III-D, and IV of that opinion were joined by REHNQUIST, C.J., and KENNEDY and THOMAS, J.J., and by SCALIA, J., to the extent heretofore indicated; and Part III-C was joined by KENNEDY, J. SCALIA, J., and THOMAS, J., filed opinions concurring in part and concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined. SOUTER, J., filed a dissenting opinion, in which GINSBURG and BREYER, J.J., joined. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined.

Id. at 2101.

subcontractors that were small businesses controlled by socially and economically disadvantaged individuals.[153] "Socially disadvantaged" was defined as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," and "economically disadvantaged" was defined as "socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities. . . ."[154] Some ethnic groups were presumed to be socially disadvantaged, but the maze of regulations produced uncertainty regarding presumptions of economic disadvantage.[155] Both the presumption or fact of disadvantage in either or both categories could be rebutted by third parties.[156] Mountain Gravel & Construction Company had been awarded a USDOT contract for construction of a highway in Colorado.[157] Although Adarand had been the low bidder on the guardrail component of the project, Mountain Gravel awarded the bid to Gonzales Construction Company, a qualifying disadvantaged subcontractor. Mountain Gravel only made such an award because of the USDOT payment for the selection of Gonzales.[158] After this denial, Adarand sued the Secretary of Transportation alleging that it had been denied a benefit on the basis of race.[159]

Justice O'Connor agreed with Adarand that the governmental burden was based on race, not merely disadvantage.[160] After reviewing all the Court's affirmative action decisions, she concluded that the Court's opinions through *Croson* established three general principles controlling the government's use of racial classifications: 1) skepticism—all racial criteria were inherently suspect; 2) consistency—the standard of review should not change depending on the race of the burdened; and, 3) congruence—the equal protection analysis applicable to the federal government pursuant to the Fifth Amendment is identical to the analysis applicable to state governments pursuant to the Fourteenth Amendment.[161] These principles dictated a holding that any racial classification by either a federal or state governmental actor be subjected to the highest standard of equal protection review—strict scrutiny.[162] The decision in *Metro Broadcasting*, clearly inconsistent with this result, was specifically overruled as being inconsis-

153. *Id.* at 2101-04.
154. *Id.* at 2102.
155. *Id.* at 2103.
156. *Id.* at 2102-03.
157. *Id.* at 2102.
158. *Id.*
159. *Id.* at 2104.
160. *Id.* at 2105-06.
161. *Id.* at 2111.
162. *Id.*

tent with fifty years of decided case law.[163] O'Connor concluded by reiterating that any governmental benefit or burden based on race must serve a compelling governmental interest and be narrowly tailored to further that interest.[164] She again indicated that carefully drafted legislation designed to remedy specific instances of past discrimination might satisfy the strict scrutiny standard.[165]

Justices Scalia and Thomas concurred in most of the O'Connor opinion but wished to offer independent insights. Scalia indicated that remedying past societal discrimination could never constitute a "compelling" governmental interest.[166] In his view, the Constitution would not tolerate any concept of a "debtor" or "creditor" race.[167] Scalia concluded by noting that, in the eyes of the government, citizens were all one race—American.[168] Justice Thomas wrote to indicate his belief that all governmental activity based on race was harmful to the minority race.[169] Benign legislation reflected a racial paternalism which reinforced the badge of racial inferiority condemned by the civil rights movement.[170] He concluded that well intentioned motivation was irrelevant in assessing Constitutional harm and that racial discrimination based on benign prejudice was just as harmful as discrimination based on malicious prejudice.[171]

Justice Stevens' dissent agreed with the Court's underlying understanding of skepticism, but strenuously disagreed with its interpretation of consistency and congruence.[172] He found untenable the majority's assertion that no Constitutional distinction exists between a majority imposing a burden on a minority race and a majority decision to redress past discrimination by burdening itself.[173] The majority's disregard of benign intent seemed especially inapposite considering the Court's consistent holding that malicious intent is a Constitutional requirement to violating equal protection in the context of invidious discrimination.[174] Stevens was equally forceful in his disagreement with the Court's concept of congruence. Congress' status as a co-equal branch of government with independent Constitutional authority under Section 5 of the Fourteenth Amendment, its character as a national legislature providing representation for any

163. *Id.* at 2112-13, 2115.
164. *Id.* at 2117.
165. *Id.*
166. *Id.* at 2118 (Scalia, J., concurring).
167. *Id.* (Scalia, J., concurring).
168. *Id.* at 2119 (Scalia, J., concurring).
169. *Id.* (Thomas, J., concurring).
170. *Id.* (Thomas, J., concurring).
171. *Id.* (Thomas, J., concurring).
172. *Id.* at 2120 (Stevens, J., dissenting).
173. *Id.* (Stevens, J., dissenting).
174. *Id.* at 2122 (Stevens, J., dissenting).

individual who might be burdened by its activity and Congress' historic role as a defender of racial minorities against state oppression provided an integral basis for treating federal affirmative action different from state activity.[175] Stevens concluded by noting that the only direct precedent, *Fullilove* and *Metro Broadcasting*, dictated affirmance of a federal scheme which was widely debated and analyzed in Congress and more broadly inclusive than either of the previous two plans.[176]

IV. A CRITIQUE AND PROPOSAL

Justices Brennan and Marshall, in their different opinions in *Bakke*, both succinctly summarized the heart of the affirmative action debate as being whether the same Constitution which permitted blatant racial discrimination for 200 years mandated that modern legislative efforts to rectify that historical reality be color-blind.[177] The Supreme Court's answer to this question has been heavily influenced by its commitment to the primacy of fairness.[178] This doctrine, which assumed its modern form in the civil rights movement of the 1960s, seemed to be applicable in affirmative action. Imposing a burden on innocents—individuals who had not directly caused harm to now advantaged racial minorities—seemed to violate the dictates of fairness.[179] Motivated by that analysis, the Court's opinions have miscast the judicial analysis of affirmative action issues and ignored the communal values which inspired the civil rights movement, initiated the concept of fairness and provides the only hope for meaningful social justice.[180] The on-going debates over the appropriate standard of review, the intricacies of what constitutes truly remedial activity and the distinctions between federal and state governmental activity are all misguided inquiries dictated by the exaggeration of fairness

175. *Id.* at 2123-26 (Stevens, J., dissenting).

176. *Id.* at 2127-30 (Stevens, J., dissenting). Justice Souter's dissent hoped that strict scrutiny would be more easily satisfied in the affirmative action context and emphasized that the majority had not dealt with Congress' power pursuant to Section 5 of the Fourteenth Amendment. *Id.* at 2131-34 (Souter, J., dissenting). Justice Ginsburg's dissent noted that, for most of American history, the government did not embrace the "we are all one race" theory. The real issue in affirmative action cases is how to remedy the reality of discrimination. *Id.* at 2134-36 (Ginsburg, J., dissenting).

177. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 326-27 (1978)(Brennan and Marshall, J.J., concurring in part and dissenting in part).

178. Aside from considerations of fairness, the remedying of societal discrimination would seem to clearly support affirmative action policies. *See* Kathleen L. Barron, Comment, *Color Blind Line:* Shaw v. Reno *and the Demise of Majority-Minority Districts*, 31 HOUS. L. REV. 889, 916 (1994).

179. *See* Mark Strasser, *The Invidiousness of Invidiousness: On the Supreme Court's Affirmative Action Jurisprudence*, 21 HASTINGS CONST. L.Q. 323 (1994).

180. *See* WEST, *supra* note 31, 55-58.

and the related notions of procedure and precedent. The confusion and multiplicity of opinions produced by the Court is reflective of an analytical structure which is simply inadequate for dealing with the level of complexity presented by affirmative action issues. Such a fairness-based analysis can no longer even provide the benefits of consistency and certainty which supported its initial prioritization.[181]

As the parables indicate, social justice is not compatible with the primacy of fairness. Social justice requires a variety of values and virtues, with a commitment to be fair simply one such value.[182] A national commitment to undo the wrong of racism requires that the country acknowledge that, in the spirit of compassion and self-sacrifice, some majoritarian race members will be denied some short-term opportunities. In a strict interpretation of fairness, this result is surely unfair in that certain individuals will be denied a benefit, usually financial, even though they are innocent of any direct racial wrongdoing.[183] However, individuals will frequently perceive short-term unfairness if they are denied some material benefit they desire.[184] The issue, therefore, is not whether something is unfair, but whether communal values locate the perceived unfairness in a long term context which benefits society. In the spirit of compassion and self-sacrifice, modern American society should be able to acknowledge the existence of a limited amount of unfairness which is justified by the eventual elimination of racism and its effects. Such a long-term perspective also includes the realization that affirmative action was conceived as a partial means of redressing 200 years of expressed governmental and societal discrimination and as a component of the national commitment that the system of mandated racial inferiority would never be reinstituted. These policies were never intended to be a cure for all of the problems which plague racial minorities in America or to satisfy fully the demands of social justice in a modern society.

A communal perspective regarding affirmative action also requires a sophisticated examination of the harm inflicted upon members of the racial majority. In most cases, that harm consists in the denial of a financial or material benefit.[185] The denial of such a short-term benefit is not equivalent to being subjected to individual or cultural deri-

181. *See supra* notes 8-18 and accompanying text.
182. *See supra* notes 26-34 and accompanying text.
183. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 296 (1986)(Marshall, J. dissenting)("I, too, believe that layoffs are unfair. But unfairness ought not be confused with constitutional injury.").
184. Any parent is painfully aware that fairness is the recurring argument of children who have been denied a "benefit."
185. The harm in all of the Supreme Court cases discussed is properly characterized as financial. In a long-term perspective, this harm cannot be perceived as outweighing the values supporting redress of societal discrimination—even Bakke

sion based on race.[186] The Court should remain vigilant to invalidate governmental action which is, in fact, based upon disrespect for an individual's or a group's race. However, if such disrespect is not actually present, the unfairness of a lost financial opportunity should not be allowed to limit a legislative body's ability to reverse 200 years of societal discrimination.[187] The denial of a benefit will, to a certain extent, undermine the "Nation's commitment" to judge people based on individual merit.[188] But that "commitment" was never truly followed in a capitalistic society and was certainly never applied to racial minorities for most of the Nation's existence.[189] A society based on communal values possesses the maturity to acknowledge that some perceived unfairness, particularly from a short-term perspective, will always exist and the self-esteem to believe that such unfairness is tolerable if justified in the context of long-term communal best interests.

The Court's emphasis on a remedial justification for affirmative action decisions, motivated at heart by the primacy of fairness, has also confused the legislative and judicial function. By insisting that affirmative action can only be invoked to remedy proven or admitted past discrimination, the Supreme Court has denied a legislative body the ability to legislate[190] and has mandated that legislatures perform the judicial function of deciding guilt and imposing penalty.[191] The remedial analysis has also failed to differentiate between constitutionally mandated activity and constitutionally permissible action. If a governmental body had been guilty of racial discrimination, the Fourteenth Amendment mandates that such discrimination be effectively remedied.[192] The primacy of fairness has demanded that this re-

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received admittance to another Medical School. *See supra* notes 79-83 and accompanying text.

186. This notion is similar to Justice Brennan's concept of stigma in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 356-62 (1978)(Brennan, J., concurring in part and dissenting in part), and Justice Stevens' insights regarding exclusion and inclusion in Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 316-17 (1986)(Stevens, J., dissenting).

187. The concern that a group might need governmental assistance to succeed, noted as a stereotype in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978), would not appear to be disrespect for race. An individual or group needing assistance should never be a cause for embarrassment or shame, especially after 200 years of victimization by governmentally sanctioned discrimination.

188. *See supra* note 177 and accompanying text.

189. Many financial benefits and opportunities are distributed in a capitalistic society with no regard for merit, wealth usually being a more important criterion. *See* Jewell, *supra* note 28.

190. This function can best be described as balancing various interests and values to create substantive law. *See* Brilmayer, *supra* note 48.

191. *See* Justice Stevens' opinion in Richmond v. J.A. Croson, Co., 488 U.S. 469, 513-14 (1989)(Stevens, J., concurring).

192. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). These remedies may clearly include race based judicial orders.

quired redress of a constitutional wrong serve as a limitation on constitutionally permissible action to remedy a societal wrong. The legislative body is constitutionally permitted to give voice to communal values and accept some short-term unfairness in order to provide a long-term societal benefit. Affirmative action policies are clearly consistent with constitutional mandates or they could not be permitted even in the remedial context. The Court, through its interpretation of fairness, has declared that these valid legislative actions are outweighed by the burden imposed on innocents in the non-remedial setting. This result is particularly inapposite based on the inherent limitations placed on a legislature's affirmative action activity by the political process. Given the nature of the legislative process and the acknowledged unfairness in the deprivation of a benefit, governmental action implementing affirmative action policies will not be lightly considered and will almost certainly be the least restrictive alternative.[193] Once the legislative body has performed its constitutionally permissible task of implementing communal values, the judiciary should limit its inquiry to the analysis of whether any actual disrespect for race is present in the action at issue.[194]

The Court's recent opinion in Adarand reflects the limits of the fairness rationale. The Court's formulation of the three principles of skepticism, consistency and congruence is itself the product of excessive generalization and superficiality.[195] The skepticism analysis overlooks the political reality that any burden imposed by the majority upon itself has already been reviewed in detail by voters and their accountable representatives. The consistency argument simply assumes the answer to the question posed by affirmative action cases—does the standard change depending on the race of the burdened?—and substitutes catch phrase superficiality for value directed balancing. Finally, the congruence emphasis distorts *Bolling's* values inspired holding, that not subjecting Congress to an equal protection integration mandate would be unthinkable, into an excuse for ignoring the different constitutional status distinguishing Congress from state legislatures. The Court's devotion to the fairness construct then dictates that this reasoning be precedentially justified by overruling *Metro Broadcasting* and ignoring *Fullilove*.[196] The Court therefore persists in applying the dictates of fairness and its harmful consequences in the affirmative action setting instead of a values based bal-

193. *See* Justice Marshall's opinion in Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 310 (1986)(Marshall, J., dissenting).

194. *See supra* notes 101-102 and 128 and accompanying text.

195. *See supra* notes 59-78 and accompanying text.

196. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2127-28 (Stevens, J., dissent).

ancing of competing interests necessary for the achievement of true racial equality.

V. CONCLUSION

If the United States is a community, its culture possesses a shared moral and philosophical tradition which will define its communal values. In America, these values include empathy, self-sacrifice and a willingness to suffer short-term disadvantage for long-term gain.[197] The legal system must return fairness to its proper role—the commitment to be fair within the context of other more important values. In this perspective, materialism and individualism, encouraged by the primacy of fairness, will be subordinated to communal values and the communal good.[198] The restored primacy of these values, the true motivation for the civil rights movement, will inform an enlightened legal analysis of affirmative action issues and will provide a foundation for the implementation of meaningful social justice in America.

> In conclusion, I leave the esoteric new frontiers to others. I ask only that we resurrect our national spirit of compassion, of fairness, of obligation to others less fortunate, and that we end, once and for all, this ten year old era of selfishness, insensitivity, and smug self satisfaction—the "I got mine, and if you weren't so lazy or shiftless, you'd have gotten yours" mentality. Let us return to the time not so long ago when government cared about people, and when society and the courts cared about justice, about equality, about ending our greatest national shame: the effects of generations of racial discrimination. Our legal system has gone through similar times of racial insensitivity before, such as the era of *Dred Scott* and *Plessy v. Ferguson*, and we have come out of those eras resilient. When one branch of government falters, others tend to take over. The job will not be done by one thousand—or even one million—points of light. It can be done, however, by a compassionate and fair-minded government with the help and support of a decent American people.[199]

197. *See supra* notes 33-34 and 55 and accompanying text.

198. The personal nature of constitutional rights (noted for example *supra* note 96 and accompanying text) does not necessarily mean the glorification of individualism. Personal rights and respect for individuals can exist within a community which values long-term societal best interests. *See supra* note 27 and accompanying text. Kurt Vonnegut, Jr. suggests that, given America's abundant resources, an increased sharing among individuals may be enough to establish social justice within our community. *See* VONNEGUT, *supra* note 35, at 88.

199. Reinhardt, *supra* note 56, at 148-49.